

NTSB Order No. EA-3682

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 21st day of September, 1992

Respondent .

5851

violated Federal Aviation Regulation (FAR) section 61.15(a)(2)<sup>2</sup> because of his conviction for Federal offenses relating to the sale, disposition, possession, transportation and importation of unlawful drugs, and that these offenses involved the use of an aircraft, warrant revocation of respondent's commercial pilot certificate.

Respondent admits that on January 6, 1986, he was convicted of several offenses, including conspiracy to deal in narcotics through a pattern of racketeering, conspiracy to import marijuana, conspiracy to distribute marijuana, and interstate travel to promote exportation and distribution of marijuana, violations of several sections of Titles 18, 21, and 31 of the United States Code. He asserts, nonetheless, that since none of the federal statutes under which he was convicted specifically require the use of an aircraft as an element of any of the offenses, there still remains a material issue of fact which the law judge was required to determine. Further, he asserts, the law judge erred in relying on the decision of the United States Court of Appeals for the Eighth Circuit which affirmed his conviction, United States v. Kragness, 830 F.2d 842 (8th Cir.

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<sup>2</sup>FAR §61.15(a)(2) provided at the time as follows:

"§61.15 Offenses involving alcohol or drugs.

(a) A conviction for the violation of any Federal or state statute relating to the growing, processing, manufacture, sale, disposition, possession, transportation, or importation of narcotic drugs, marihuana, or depressant or stimulant drugs or substances is grounds for....

(2) Suspension or revocation of any certificate or rating issued under this part."

1987). He asserts that the testimony of a co-conspirator which describes the use of aircraft and airfields in furtherance of the conspiracy is insufficient, when the judgment and conviction order were not offered into evidence by the Administrator and would not, in any event, establish that respondent personally used an aircraft in furtherance of the commission of the offenses. Finally, respondent asserts, the law judge erred in failing to dismiss the complaint under the Board's stale complaint rule, 49 C.F.R. section 821.33, because the convictions occurred in 1986, involving offenses dating back to 1979, and the Administrator did not issue the Notice of Proposed Certificate Action until 1989.<sup>3</sup> The Administrator has filed a reply brief, urging the Board to affirm the law judge's order.<sup>4</sup>

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<sup>3</sup>49 C.F.R. §821.33 provides in pertinent part as follows:

"§821.33 Motion to dismiss stale complaint.

Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising respondent as to reasons for the proposed action under section 609 of the Act, respondent may move to dismiss such allegations pursuant to the following provisions:

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(b) In those cases where the complaint alleges lack of qualification of the certificate holder:

(1) The law judge shall first determine whether an issue of lack of qualification would be presented if any or all of the allegations, stale and timely, are assumed to be true....

(2) If the law judge deems that an issue of lack of qualification would be presented by any or all of the allegations, if true, he shall proceed to a hearing...."

<sup>4</sup>Respondent requests permission to file a reply to the Administrator's reply brief. The Board's Rules of Practice and Procedure do not provide for the filing of further briefs, absent a showing of good cause therefor. 49 C.F.R. §821.48(e). Since no good cause has been shown, respondent's request is denied.

Upon consideration of the briefs of the parties, and of the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order. For the reasons that follow, we will deny respondent's appeal.

We turn first to the procedural issue. Respondent asserts that the complaint could not survive his stale complaint motion because it did not allege a lack of qualification. Respondent is in error. In fact, the Administrator's complaint does allege that because of his drug convictions, respondent lacks the care, judgment, and responsibility to hold an airman certificate. The lack of care, judgment, and responsibility is an example of lack of qualification. Administrator v. Finefrock, 5 NTSB 632, 633 (1985). Thus, the allegations, if true, presented an issue of lack of qualification and the law judge properly denied the motion to dismiss the complaint as stale.

Respondent asserts that the allegation of a violation of FAR section 61.15(a)(2) cannot stand because none of the offenses upon which he was convicted specifically require the use of an aircraft as an element of the offense. Respondent misunderstands the regulation under which he was charged.<sup>5</sup> FAR section 61.15 provides for suspension or revocation of an airman certificate

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<sup>5</sup>Section 609(c) of the Federal Aviation Act of 1958 mandates revocation of the airman certificates of any person who serves as an airman or was on board an aircraft in connection with activity involving the transportation or distribution of a controlled substance; respondent's criminal acts, however, preceded the enactment of this portion of the statute.

where the holder of that certificate has been convicted for the violation of a drug-related statute, as set forth in the regulation. See footnote 2, supra. Whether an aircraft was used in the commission of the offense is relevant only as to the issue of sanction. Board precedent is clear that revocation will be affirmed where an aircraft has been used in the commission of the offense. See e.g., Administrator v. Coulombe, 5 NTSB 2226, 2227 (1987), and cases cited therein.

Finally, we turn to the issue as to whether there is sufficient evidence of use of aircraft in the commission of these offenses to support summary judgment. We have reviewed the court's decision in United States v. Kragness, 830 F.2d 842 (8th Cir. 1987). It is replete with references to aircraft and airfields which were used by the conspirators in the commission of their offenses. While it may be true that the only evidence that respondent personally operated aircraft during these offenses is the testimony of one of his co-conspirators, the Court of Appeals nonetheless affirmed the convictions against respondent, finding the jury's credibility determinations in favor of the government's witnesses to be proper.<sup>6</sup> In any event, there is overwhelming evidence that the entire drug-trafficking enterprise was dependent on the use of aircraft to transport and

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<sup>6</sup>Respondent asserts that this co-conspirator's testimony against him is not credible because he testified in accordance with a grant of immunity and plea bargain. The Eighth Circuit rejected a similar claim, noting that the jury found this testimony credible, and that it was corroborated "in numerous respects by a variety of documentary and testimonial evidence." United States v. Kragness, 830 F. 2d at 864-865.

distribute controlled substances, and the Eighth Circuit concluded that respondent was substantially involved in that operation, noting that respondent and another co-conspirator "...occupied positions of authority, arranging and directing the group's drug importation and distribution. They recruited and assigned personnel, oversaw the provision of logistical and materiel requirements, such as airfields and planes, and provided and organized financial backing." 830 F.2d 857. Indeed, respondent even admitted to a girlfriend who apparently testified at trial that this was "his organization." Id. Under these circumstances, we agree with the law judge that there were no material issues of fact which required a hearing, and the law judge did not err in granting the Administrator's motion for summary judgment.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The Administrator's order is affirmed; and
3. The revocation of respondent's commercial pilot certificate shall begin 30 days after service of this order.<sup>7</sup>

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

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<sup>7</sup>For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR §61.19(f).